STRENGTHENING COOPERATION IN PROMOTING AND PROTECTING THE ECONOMIC, SOCIAL and cultural RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA

Presentation prepared for Workshop on Enhancing Cooperation between United Nations and Regional Mechanisms for the Promotion and Protection of Human Rights, Geneva, 8-9 October 2014

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# I: Introduction

1. The aim of this presentation is to share methods of work, good practices and lessons learnt and standards developed by African human rights mechanisms in promoting and protecting the economic, social and cultural rights of persons with disabilities in Africa so as to identify common priorities, challenges, synergies and possible complementarities.
2. The presentation tackles the following issues:
	1. The character of and effectiveness of current frameworks for protecting and promoting the economic, social and cultural rights of persons with disabilities in Africa;
	2. The gaps and opportunities in the existing framework of cooperation between United Nations (UN) and African human rights mechanisms in promoting and protecting the economic, social and cultural rights of persons with disabilities; and
	3. How UN and African mechanisms may make better use of other key stakeholders including National Human Rights Institutions (NHRIs) and nongovernmental organisations (NGOs) in promoting and protecting the economic, social and cultural rights of persons with disabilities.

# II: The character and Effectiveness of Frameworks for Protecting and Promoting the Economic, Social and Cultural Rights of Persons with Disabilities in Africa

1. The 1981 African Charter on Human and Peoples’ Rights[[1]](#footnote-1) (the ‘African Charter’ or ‘Charter’) is the Continent’s flagship human rights instrument. The African Charter establishes a corpus of civil, political, economic, social, cultural and peoples’ rights as well as duties to which 52 of Africa’s States presently subscribe.
2. Specifically-stated economic, social and cultural rights are: the right to work (Article 15), the right to enjoy the best attainable state of physical and mental health (Article 16) and the right to education (Article 17). Alongside these rights, the 2004 Pretoria Declaration on Economic, Social and Cultural Rights in Africa[[2]](#footnote-2) clarifies that the economic, social and cultural rights established explicitly in the Charter have to be read in tandem with other Charter rights and that the totality of those rights imply other rights such as the rights to shelter, basic nutrition and social security.
3. The African Charter also establishes the following peoples’ rights which focus on economic, social and cultural rights: the right of peoples to existence and to self-determination including pursuance of economic and social development according to the policy they have freely chosen (Article 20); the right of peoples to freely dispose of their wealth and natural resources (Article 21); and the right to economic, social and cultural development (Article 22).
4. Application of these economic, social and cultural rights to persons with disabilities involves two levels:
	1. Article 2 of the African Charter provides that: ‘Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.’ While the ground of disability is not mentioned specifically in this provision, the listed grounds are illustrative and not exclusive and persons with disabilities therefore are part of the individuals entitled to enjoy Charter rights and freedoms.
	2. Specific reference to persons with disabilities is made in Article 18 (4) of the Charter which provides that: ‘The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.’
5. Africa’s framework for protecting the economic, social and cultural rights of persons with disabilities is supplemented by a number of other human rights instruments:
	1. The 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa[[3]](#footnote-3) (Women’s Protocol) requires States to: ‘Ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making’.
	2. The African Charter on the Rights and Welfare of the Child[[4]](#footnote-4) (Children’s Charter) requires States, subject to available resources, to ensure that a child with disability has effective access to training, preparation for employment and recreation opportunities ‘… in a manner conducive to the child achieving the fullest possible social integration, individual development and his/her cultural and moral development’ (Article 13).
	3. The 2006 African Youth Charter[[5]](#footnote-5) (Youth Charter) provides that measures for realising the right to gainful employment for the youth should offer protection against discrimination on various grounds including disability (Article 15 (1) (a). Article 24 of the Youth Charter requires States to ensure that youth with disabilities have access to education, training, healthcare services employment, sport, physical education and cultural and recreational activities’ (Article 24 (1).
6. The above-described framework has its particular strengths:
	1. Unlike the UN human rights corpus which segments the protection and promotion of human rights under a civil and political rights instrument and an economic, social and cultural rights instrument, the African Charter presents all rights in one instrument thereby, as the 1993 Vienna Declaration and Plan of Action restated,[[6]](#footnote-6)affirming that human rights are indivisible, interrelated and interdependent.
	2. The Charter has an inclusive equality and non-discrimination clause: ‘… or any status’ (Article 2).
	3. It recognises the rights of individuals but also the rights of peoples.
	4. It provides specific third-generation or collective rights such as the right to development, the right to a satisfactory environment, the right to peace, and the right of people to dispose of their wealth and natural resources.
	5. It introduces the concept of duties at two levels – individuals to others, their family and society; and State to individuals.
7. The effectiveness of this framework though particularly regarding protection of the rights of persons with disabilities is undermined by a number of normative and practical challenges:
	1. Much of the disability-specific content in Continental human rights instruments is underpinned by the deficit/medical rather than the social/rights model of disability. The Women’s Protocol, Children’s Charter and Youth Charter overemphasise the ‘special’ character of persons with disabilities at the expense of reaffirming and protecting their rights.
	2. The rights of persons with disabilities in some of those instruments are made subject to progressive realisation and availability of resources while other rights in those instruments are not similarly treated. For example Article 13 of the Children’s Charter requires States Parties to provide appropriate assistance to a disabled child who applies for it subject to availability of resources. States are also required to use their available resources to progressively realise accessibility for persons with disabilities. Significantly, this Charter does not apply the principle of progressive realisation to any of the economic and social rights which it establishes, raising the question why it was found necessary to apply the principle in relation to the rights of children with disabilities.
	3. Core disability rights concepts such as reasonable accommodation, legal capacity and independent living remain on the normative fringes of Continental human rights instruments.
	4. At the operational level, disability-specific interventions by the African Commission on Human and Peoples’ Rights (the Commission) and other Continental human rights institutions have not been prolific. Not more than a couple of cases with specific disability content have been determined by the Commission. Only in the last few years has the Commission begun to make specific acknowledgement of persons with disabilities in the resolutions it adopts.[[7]](#footnote-7)

# II: Gaps and Opportunities in the Existing Framework of Cooperation between UN and African Human Rights Mechanisms in Promoting and Protecting the Economic, Social and Cultural Rights of Persons with Disabilities

1. One of the current frameworks of cooperation between UN and African human rights mechanisms is the mutual cooperation that exists between their special procedures mandate holders. To date though, the Working Group on Older Persons and Persons with Disabilities in Africa (the Working Group) has not had a like interlocutor from the UN human rights system with whom to engage. It is therefore with pleasure that the Working Group looks forward to the eminent appointment of the Special Rapporteur on Disability.
2. The terms of reference of the Working Group include:
	1. holding comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities;
	2. facilitating and expediting comparative research on the various aspects of human rights of older persons and people with disabilities on the Continent, including their socio-economic rights;
	3. collecting data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development programmes of Member States;
	4. identifying good practices to be replicated in Member States; and
	5. Submitting a detailed report to the African Commission at each Ordinary Session.[[8]](#footnote-8)
3. Once the Special Rapporteur on Disability is appointed, the two mandates should backstop each other towards ensuring the rights of persons with disabilities in Africa.
4. A matter of particular concern to the Working Group is the current unequal normative standards on the rights of persons with disabilities. The Working Group is consequently in the process of preparing the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (the Disability Protocol). The Working Group appreciates the fact that the Office of the High Commissioner for Human Rights (OHCHR) had made substantive comments to the draft Disability Protocol; and the Working Group trusts that this relationship will continue.
5. Regarding the process for preparing the Disability Protocol as well as its content, the Working Group is cognizant that the Convention on the Rights of Persons with Disabilities (CRPD) is the foundational global standard-bearer on the rights of persons with disabilities. Any new disability rights instrument must not undermine the minimum standard established in the CRPD.
6. The Working Group is proceeding on the basis that this Protocol offers a veritable opportunity for raising the bar for the rights of persons with disabilities in Africa by establishing further affirmations and clarifications to tackle Africa’s specificities and realities in areas such as:[[9]](#footnote-9)
	1. Protection of parents, guardians and caregivers from discrimination on the basis of their actual or apparent association with persons with disabilities;
	2. Protection of persons with disabilities from harmful practices;
	3. Calibration of provisions on living in the community to have specific regard for community based rehabilitation services which are a key feature of Africa’s approach to disability;
	4. Provision against any presumption that persons with disabilities may be uneducable or untrainable;
	5. Clarification that the support required by persons with disabilities to enjoy their legal capacity must respect their rights, will and preferences, and must not amount to substituted decision-making; and
	6. Unlike the CRPD but in consonance with Africa’s human rights standards, the Draft Protocol makes explicit mention that all persons with disabilities too have responsibilities to other individuals, their families and to the community.
7. It is essential that a common resource pool be established from which drawings may be made to facilitate joint cooperation activities.

# III: Roles of Other Stakeholders in Supporting African and UN Human Rights Frameworks That Protect the Economic, Social and Cultural Rights of Persons with Disabilities in Africa

1. Impacting the end-beneficiary of established normative standards and frameworks remains a largely unresolved conundrum:
	1. NHRIs and NGOs should play more effective roles to link end-users with African and UN human rights institutions.
	2. More disability-specific communications need to be filed before the African Commission and its counterpart UN treaty bodies.
	3. The Commission should be moved to adopt more disability-specific resolutions.
	4. NHRIs and NGOs should also participate more wholesomely in unpacking the concepts and norms at the heart of the paradigm shift from a charity model to a social rights model of disability.
	5. Finally, one surely enduring character of the CRPD is its Article 33 provisions on the establishment of independent frameworks to monitor implementation of the Convention.Both global and regional human rights mechanisms should facilitate national independent mechanisms to play this monitoring function effectively.
1. African Charter on Human and Peoples’ Rights, adopted on 27 June 1981, entered into force on 26 October 1986: <http://www1.umn.edu/humanrts/instree/z1afchar.htm> [↑](#footnote-ref-1)
2. <http://www.achpr.org/instruments/pretoria-declaration/> [↑](#footnote-ref-2)
3. <http://www.achpr.org/instruments/women-protocol/#23> [↑](#footnote-ref-3)
4. <http://caselaw.ihrda.org/doc/acrwc/view/> [↑](#footnote-ref-4)
5. <http://www1.umn.edu/humanrts/instree/african_youth_charter.html> [↑](#footnote-ref-5)
6. Article 5 of the Vienna Declaration and Plan of Action, <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> [↑](#footnote-ref-6)
7. <http://www.achpr.org/sessions/54th/resolutions/263/> (accessed on 7 October 2014) [↑](#footnote-ref-7)
8. <http://www.achpr.org/sessions/55th/resolutions/269/> (accessed on 10 August 2014) [↑](#footnote-ref-8)
9. See: Lawrence Mute, ‘Perspectives on Considerations for an African Protocol on the Rights of Persons with Disabilities’, forthcoming, African Disability Rights Yearbook, Centre for Human Rights, Pretoria University, 2014 [↑](#footnote-ref-9)